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Supreme Court of the United States

SENEL TAYLOR, JOHNNIETTA MCGRADY, CHRISTINE SUMA, ARKELE WINSTON, AND AMY HUDOCK,

&

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION,

&

HANNA PERKINS SCHOOL, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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AMICI CURIAE BRIEF FOR THE CENTER FOR EDUCATION REFORM, *et al.* IN SUPPORT OF PETITIONERS

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Nos. 00-1779, 00-1751, 00-1777

In the Supreme Court of the United States

Senel Taylor, Johnnietta McGrady, Christine Suma, Arkele Winston, and Amy Hudock

&

Susan Tave Zelman, Superintendent of Public Instruction,

&

Hanna Perkins School, *et al.*,

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v.

Doris Simmons-Harris, *et al.*,

Respondents

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

AMICI CURIAE BRIEF FOR THE CENTER FOR EDUCATION REFORM, *et al.* IN SUPPORT OF PETITIONERS[1]

INTERESTS OF AMICI CURIAE[2]

The Center for Education Reform ("CER") is a national, independent, non-profit advocacy organization founded in 1993 to advance substantive reforms in public

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[1] Pursuant to Supreme Court Rule 37.6, no person other than Counsel identified on the cover and the staff of The Center for Education Reform participated in authoring this brief. No entity other than amici and their counsel provided financial support for this brief.

[2] The consent of the parties to the filing of this *amicus curiae* brief has been obtained and filed with the Clerk of the Court.

education. CER works with parents and teachers, community and civic groups, policymakers, grassroots leaders, and all other interested citizens to ensure that ideas critical to education reform are identified, understood and implemented. CER is an active broker in bridging policies and practices through coalition building and by working with diverse constituencies to implement reforms that improve access, accountability, and assessment, and that help restore education excellence and equity to America's public schools.

The American Legislative Exchange Council is the nation's largest bipartisan association of state legislators. Its mission is to discuss, develop, and disseminate public policies that expand free markets, promote economic growth, limit government, and preserve individual liberty.

The Arizona School Choice Trust was founded on the philosophy that parents should have a choice in their children's education, and provides tuition grants for children from disadvantaged families to attend any private school in Arizona.

California Parents for Educational Choice, the Coalition for Parental Choice in Education (Massachusetts), the Education Excellence Coalition (Washington), Floridians for School Choice, the Illinois Coalition for Parental Choice, the Maine School Choice Coalition, and United New Yorkers for Choice in Education are non-profit, largely grassroots organizations dedicated to the right of parents to choose the best education for their children and to promoting meaningful school choice programs.

The Center for Equal Opportunity ("CEO") is a District of Columbia non-profit organization whose main purpose is to study issues concerning race and ethnicity.

CEO has participated actively in a wide variety of civil rights cases.

The Center for Public Justice is a national nonprofit organization that has been making the case for justice in the reform of educational governance and funding for nearly 25 years by advocating equal funding of all students in any licensed school, whether publicly governed or independent, secular or religious.

Children First: CEO Kansas is the state affiliate of the national Children First: CEO America scholarship program for underprivileged students. Their purpose is to assist in equalizing educational opportunities for low-income families by offering options normally denied to them because of cost.

Citizens for Educational Freedom (CEF) is a national, grassroots organization with its headquarters in Missouri. Founded in 1959, CEF is dedicated to supporting parents' rights to choose schools for their own children. **The Educational Freedom Foundation** is a charitable foundation affiliated with CEF and serves to educate the public about parental rights in education and school choice issues.

The Commonwealth Foundation of Pennsylvania is an independent, non-partisan, non-profit public policy organization committed to advocating policies that expand choice and opportunity in education, while also presenting innovations and ideas aimed at reinvigorating the current system and empowering parents and taxpayers.

Excellent Education for Everyone is a coalition of New Jersey citizens that works to enable public schools to better educate children by subjecting their schools to the competitive pressures of school choice, believing that competition will improve school performance, provide

accountability, and assure that all children receive a quality education.

"I Have A Dream" Foundation of Washington D.C. is a non-profit education foundation serving at-risk inner city youth. The Foundation supports school choice because it will provide a better education and a better chance for a bright, successful future for these youth.

The Hispanic Council for Reform and Educational Options is dedicated to improving educational outcomes for Hispanic children by empowering families to access all educational options and to be an agent for educational equity and quality.

Minnesota Business Partnership ('MBP") is a non-profit, non-partisan public policy organization whose members are leaders of 103 of Minnesota's largest companies. Since its founding in 1977, MBP's mission has been to develop and advocate public policy that strengthens Minnesota's economy and improves the quality of life. Improving the education system is a critical component of that mission.

The **Nevada Manufacturers Association** ("NMA") represents manufacturers in Nevada. The **Pennsylvania Manufacturers Association** ("PMA") represents manufacturers in Pennsylvania and other Midwestern and Mid-Atlantic states, including Ohio. **Associated Industries of Vermont** ("AIV") represents manufacturers and other businesses in Vermont. The NMA, PMA, and AIV have a long-term interest the development of a skilled, educated, and effective workforce.

The Texas Justice Foundation is a non-profit, public interest, litigation foundation that works in the area of education law and school choice, representing parents and their fundamental right to direct the upbringing and

education of their children, a right recognized by this Court since 1923.

The Toussaint Institute Fund helps minority parents find and access good schools for their children in the public and private sectors, and also works with communities to build better schools.

The Urban League of Miami is a non-profit organization dedicated to enabling Blacks to reach their potential and exercise their rights as human beings. Public education reform is a priority of the Urban League.

Beatrice D. Fowler of the Brevard County School Board (Florida) and **Kyle Persinger** of the Marion School Board (Indiana), representing themselves, are members of bodies charged with providing quality education for children at all socio-economic levels.

SUMMARY OF ARGUMENT

When the Ohio General Assembly first adopted the Cleveland Scholarship and Tutoring Grant Program ["the Scholarship Program"] in 1995, Cleveland's school children and their parents had been litigating desegregation and education reform issues for more than a generation.[3] See *Reed v. Rhodes*, 179 F.3d 453 (6th Cir. 1999). By the time the Scholarship Program was reenacted in 1997, it was clear that the effort to provide Cleveland's children with an adequate education untainted by racial discrimination had failed. Notwithstanding the good faith efforts of the District Court, the Ohio Supreme Court, the Ohio General

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[3] *Reed v. Rhodes* was filed in 1973. The Sixth Circuit approved the District Court's 1996 finding of unitary status with respect to student assignments in 1999. The Cleveland City School District complied with the last of its obligations under the consent decree on June 30, 2000. The litigation is chronicled in nearly forty published opinions in the federal courts, two opinions of the Ohio Supreme Court, and several opinions of the Ohio Court of Appeals.

Assembly, the State Board of Education, and the Mayor of Cleveland, the Ohio Department of Education rated the Cleveland City School District [CCSD] an "academic emergency."[4]

The Ohio Supreme Court recognized the relevance of these facts when it rejected Respondents' Establishment Clause challenge to the Scholarship Program. In its view, "[t]he General Assembly took extraordinary measures to attempt to alleviate an extraordinary situation." *Simmons-Harris v. Goff*, 711 N.E.2d 203, 214 (Ohio 1999). The Sixth Circuit, by contrast, explicitly refused to look at the legal and social context. Where the Ohio Supreme Court saw "a general program[, the] benefits [of which] are available irrespective of the type of alternative school the eligible students attend," *Goff*, 711 N.E.2d at 209, the Sixth Circuit saw a sham designed to provide State financing for religious schools. The actual design of Ohio's school financing program (of which the Scholarship Program is but a small part), the actual reasons why suburban districts do not accept inter-district Scholarship Program students, and the actual choices available to Cleveland's parents and children were, in its view, "*at best* irrelevant" to the Establishment Clause analysis. *Simmons-Harris v. Zelman*, 234 F. 3d 945, 958-959 (6th Cir. 2000) (emphasis added).

Amici submit that this Court's holdings under the Establishment, Due Process, and Equal Protection Clauses show that evidence outlining the purpose, operation, and effects of a specific education reform effort is just as essential to an inquiry under the Establishment Clause as it would be to a review of that reform under *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny.

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[4] *See* 2000 Ohio State Dep't of Educ. Cleveland City Sch. Dist. Rep., http://odevax.ode.state.oh.us/ lrc_www/99_Dist/043786.pdf, at 2.

Respondents produced no "evidence in [this] record that the [government] is in fact violating" the law. *Agostini v. Felton*, 521 U.S. 203, 228 (1997). They neither offered any proof that "the manner in which the statute is presently being administered" raises questions concerning the purpose and effect of the Cleveland Scholarship Program, *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988), nor did they demonstrate that the General Assembly's purpose was other than to take positive steps to remedy the present and future effects of racial discrimination by the Cleveland City School District [CCSD]. Based on appearances alone, the Sixth Circuit concluded that the Scholarship Program was not an *expansion* of the choices available to Cleveland's long-suffering parents and children the General Assembly intended, but rather a "government *limitation* of the available choices to overwhelmingly sectarian private schools." 234 F.3d at 960 (emphasis added).

An even-handed reading of the history and operation of the Cleveland Scholarship Program demonstrates that it is materially different in its purpose, genesis, design, operation, fiscal impact on parents and schools, and in its overall effect from the program struck down in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). Respondents have not even proved that the Scholarship Program "advances religion," *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), much less that advancement of religion is the Program's "principal or primary effect." The decision of the Sixth Circuit should be reversed.

INTRODUCTION

The background against which the State of Ohio enacted the Cleveland Scholarship and Tutoring Grant Program is unusual, if not unique. The Scholarship Program is the direct outcome of an intensely fought, politically bruising, and enormously expensive education

reform effort on the part of Cleveland's public school children and their parents. That effort began years before the plaintiffs in *Reed v. Rhodes* asked the federal courts to desegregate the system, and it is safe to predict that those efforts will continue in other fora until they are satisfied that the State of Ohio is providing both equal and adequate educational opportunities for *all* of its children.

The crisis in which the CCSD finds itself is the logical and inevitable outcome of policies and attitudes that divide communities by race, ethnicity, religion, and class, and that make the political compromises necessary to support far-reaching educational reform difficult if not impossible. *See, e.g., McGwinn v. Board of Ed. of Cleveland City Sch. Dist.*, 69 N.E.2d 391 (Ohio Com. Pl., 1945) (action by Cleveland taxpayers to prohibit free tuition for children residing on land owned by the federal government), *aff'd*, 69 N.E.2d 381 (Ohio 1946). Nearly ten years ago, Chief Judge Frank Battisti aptly summarized the situation in which the CCSD finds itself today:

> In *Reed v. Rhodes,* as in other things, a sense of history is necessary for any comprehension of the present and the future. ... Despite judicial rulings, upheld on appeal, that the Defendants had engaged in clear and intentional racial segregation, for more than a decade they displayed a recalcitrance and hostility toward the laws of the land and the remedial orders of this Court that not only prevented progress in this case but also inflicted grievous wounds on the community as a whole. Of late, no one has been heard to assert that the schools are operated in a satisfactory manner; to put it another way, every voice laments the unsatisfactory condition of the school district. This is the challenge that the Defendants, state and local, must face.

Reed v. Rhodes, No. C73-1300, 1992 WL 80626 at *1 (N.D. Ohio, Apr. 2, 1992).

Structural Changes

The CCSD has tried virtually everything. The desegregation plan opened up school assignments, implemented non-discriminatory testing and tracking procedures, required significant efforts to improve reading scores, added magnet, charter, and vocational opportunities, upgraded and reorganized transportation, implemented stronger financial and management practices, desegregated teacher and professional staff assignments, and provided extra State funding. *See Reed v. Rhodes*, 934 F. Supp. 1533, 1551-52 (N.D. Ohio 1996). See also Scott Stephens, *School Board Unveils Steps to Curb Violence*, Cleveland Plain Dealer, Oct. 29, 1994, at 1B (noting that the School Board took steps to curb rising violence in Cleveland schools); Jeanne Allen, *The School Reform Handbook*, Ch. 7, p. 62 (Center for Education Reform, Washington, D.C. 1995) (http://www.edreform.com/handbook/srhch7.htm) (noting that the State of Ohio also introduced minimum standards tests for graduating high school seniors set at a level of ninth grade proficiency).

Funding

The Scholarship Program was not the only financing change affecting the funds available to the CCSD during this period. In 1997, the Ohio Supreme Court held that certain portions of Ohio's school funding formula were unconstitutional because the complaining "school districts were starved for funds, lacked teachers, buildings, and equipment, and had inferior educational programs, and that their pupils were being deprived of educational opportunity." *DeRolfe v. State*, 677 N.E.2d 733, 742 (Ohio 1997) (*DeRolfe I*), *reh'g and clarification*, 678 N.E.2d 886 (Ohio 1997), *clarification*, 699 N.E.2d 518 (Ohio 1998).

DeRolfe I succeeded in forcing major changes in the school funding program. Since 1997, the General Assembly has enacted numerous reforms in the funding system. Some of those revisions were challenged and held to violate the Ohio Constitution, *see DeRolfe v. State*, 728 N.E.2d 993 (Ohio 2000) (*DeRolfe II*). The legislature responded once again, and on September 6, 2001, the Ohio Supreme Court issued its final opinion in the matter, approving, with conditions, the General Assembly's most recent attempts to reform the State's school funding program. *DeRolfe v. State* (*DeRolfe* III), 754 N.E.2d 1184 (Ohio 2001).

By 1995, the political infighting caused by reform efforts caused the "total fiscal and administrative collapse" of the Cleveland School District. *Reed v. Rhodes*, 934 F.Supp. 1533, 1538-39 (App.A) (N.D. Ohio, 1996). As a last resort, the District Court ordered the State Board of Education and the State Superintendent to "assume immediate supervision and operational, fiscal and personnel management of the District." *Id.* at 1560. In August 1997, Governor Voinovich signed a bill specifically designed to change the composition of the Cleveland School Board by giving the Mayor a major role in the selection of its members, and to bring some orderly resolution to competing visions of education reform. See *Mixon v. State of Ohio*, 193 F.3d 389 (6th Cir. 1999) (upholding the plan); *Malcolm-Smith v. Goff*, No. CV-342589, 1999 WL 961495 (Ohio App., Oct. 21, 1999) (unpublished, same).

The Present State of the Cleveland City School District

"Because of the confluence of poverty, poor management, and low educational achievement," the CCSD is renowned as the country's greatest educational failure. Diane Ravitch, *School Reform, Past, Present, and Future*, 51 Case West. L. Rev. 187, 189 (2001). *See also* Beth Reinhard, *Cleveland: A Study in Crisis*, Education Week,

Jan. 8, 1998, at 26. Conditions are so appalling, and the crisis has persisted for so long, that the Ohio Department of Education recently gave the Cleveland City School District "academic emergency" status.[5] The Ohio Supreme Court has recognized that "the Cleveland City School District is in a crisis related to the supervision order." *Simmons-Harris v. Goff*, 711 N.E.2d 203, 214 (Ohio 2000). This is tragic. Desegregation, properly understood, *is* education reform, and *Reed v. Rhodes* was an education reform case in every sense. It is impossible therefore to extract either *Reed*, or this case, from a social, political, and educational context where, after 25 years of litigation, only 20% of the ninth-graders in Cleveland passed the State's proficiency test, when 69% of their ninth-grade classmates can do so. *See 2000 Ohio State Dep't of Educ. Cleveland City Sch. Dist. Rep.*, http://ode000.ode.state.oh.us/ lrc_www/99_Dist/ 043786.pdf, at 2. At a social level, the indicators are even worse.

> [P]ublic schools in the Cleveland area are remarkably segregated. Most students attend schools that are almost all white or almost all minority and very few students attend schools that resemble the racial proportion in the whole community. Families wishing to attend a racially integrated school in the public system in Cleveland have very few opportunities to do so.

Appendix II, Jay P. Greene, Ph.D., *The Racial, Economic, and Religious Context of Parental Choice in Cleveland*

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[5] A rating of "academic emergency" applies to districts that meet eight or fewer of Ohio's twenty-seven performance standards. CCSD did not meet any of the standards during the 1998-1999 school year [score: 0/27], thus earning last place among all Ohio's school districts. *See* http://www.ode.state.oh.us/reportcard/RatingbyCD.pdf. In 1999-2000 CCSD met three standards, and remains an "academic emergency." *See* http://www.ode.state.oh.us/reportcard/ratings/ fy00_std_seq.htm.

(1999), reproduced in Joint Appendix (J.A.) at 213a [hereafter "Greene, *Context of Parental Choice*"].

Trying Innovative Solutions

Recognizing the intractable nature of these problems, Chief Judge Frank Battisti suggested in 1992 that the State of Ohio should be free "to think about innovative programs and undertakings, where such programs offer a realistic promise of eliminating remaining vestiges." *Reed v. Rhodes*, 1992 WL 80626, at *3. In response to this challenge, the Governor and the General Assembly adopted the Cleveland Scholarship and Tutoring Grant Program ("Scholarship Program"). Signed into law on June 29, 1995 by Governor George Voinovich, its goal was to provide funded options for poor students trapped in the Cleveland system.

With the adoption of the Scholarship Program in 1995, Cleveland's low-income families[6] had achieved one of their key educational goals.

> If a family wants to live in the Cleveland area and wants to send their children to a racially integrated school at public expense, they are more likely to do so by choosing a private school with a voucher than they are by attending a public school. Despite court orders and political pressure to improve integration in the public schools, the Cleveland Scholarship Program offers families a better opportunity for a racially integrated school experience.

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[6] Ohio Rev. Code Ann. §3313.978 [App. F, J.A. 33a] provides, in relevant part: "Students whose family income is at or above two hundred per cent of the maximum income level established by the state superintendent for low-income families shall qualify for seventy-five per cent of the scholarship amount and students whose family income is below two hundred per cent of that maximum income level shall qualify for ninety per cent of the scholarship amount."

Greene, *Context of Parental Choice*, J.A. at 213a-214a.

They could make *real* choices in the interest of their children from among a range of available educational alternatives. Cleveland's low income school children now have the following choices:

- Remain in their neighborhood school;
- Transfer within the CCSD;
- Attend a magnet school within CCSD;
- Enroll in one of Ohio's charter "community" schools;
- Use the scholarship for supplemental services such as tutoring;
- Use the scholarship to pay a portion of private school tuition; or
- Enroll *at full public expense* in any public school district in the State that has agreed by resolution to admit them under Ohio Rev. Code Ann. § 3313.98.

In sum, the Scholarship Program at issue in this case was not enacted in a vacuum. The recognized failure of the CCSD and its resistance to judicial efforts to cure its defects are "social facts" that this Court cannot ignore. *Amici* respectfully submit that the Sixth Circuit erred when it held that they are irrelevant to an Establishment Clause analysis of the Scholarship Program.

ARGUMENT

I. FACTUAL AND SOCIAL CONTEXT IS CRUCIAL TO A DETERMINATION THAT THIS SCHOLARSHIP PROGRAM "ADVANCES RELIGION."

A. Plaintiffs in an Establishment Clause Case Bear the Burden of Proving Every Factual Element of Their Claim, But Failed To Do So.

Reference to factual context is crucial when State action is alleged to violate the Constitution. *See, e.g., Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2467 (2001) (O'Connor J., concurring) ("careful examination and weighing of all the relevant circumstances"). A thorough understanding of the immediate facts and social context is critical in Equal Protection cases, see *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); in cases involving free speech, see *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); and in cases raising free exercise claims. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *Amici* submit that context is equally critical in Establishment Clause cases. *Lynch v. Donnelly*, 465 U.S. 668, 693-94 (1984) ("communicat[ion of] an endorsement of religion" is "in large part a legal question to be answered on the basis of judicial interpretation of social facts.")(O'Connor, J., concurring).

Over the years since the Court synthesized its approach to Establishment Clause adjudication in *Lemon v. Kurtzman*, 403 U.S. at 612-613, there has been a good deal of confusion concerning the relationship between and among the fact-based inquiries it requires. The stark contrast between the approach of the Ohio Supreme Court in *Simmons-Harris v. Goff*, and that of the Sixth Circuit in this case is a textbook example of a profound disagreement

over the proper approach to fact-based claims and defenses arising under the Establishment Clause.[7]

Where, as here, plaintiffs challenge an education reform program utilizing *Lemon's* three-part test, plaintiffs must prove by a preponderance of the evidence:

> That the statute – taken as a whole and viewed in context – either has no secular legislative purpose, or that the alleged purpose of the statutory scheme at issue is a pretext for an otherwise unconstitutional attempt to advance or inhibit religion;
>
> That "the principal or primary effect of the statute" – read in the education reform and remedial context in which it was adopted and operates – "advances [or] inhibits religion" in a tangible or demonstrable way; or
>
> That the nature and degree of any "entanglement with religion" under the statute is "excessive" given the nature and purpose of the programs involved and the general regulatory context in which it operates.

See Edwards v. Aguillard, 482 U.S. 578, 595 (1987) (exploring facts and history). *Cf. Gillette v. United States*, 401 U.S. 437, 451-52 (1971) (challenger must show no legitimate purpose in absence direct evidence of sectarian motive). *See also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)

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[7] The disagreement is widespread. *Compare Campbell v. Manchester Bd. of Sch. Dirs.*, 641 A.2d 352, 359-61 (Vt. 1994) (fact-based inquiry); *Jackson v. Benson*, 578 N.W.2d 602, 617-19 (Wis.), *cert. denied*, 525 U.S. 997 (1998)(same); *Kotterman v. Killian*, 972 P.2d 606, 612-15 (Ariz.), *cert. denied*, 528 U.S. 921 (1999)(same) *with Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 133-35, 144-45 (Me.), *cert. denied*, 528 U.S. 947 (1999) (intent to discriminate found but no examination of factual context or justification); *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999) (no analysis of a primary effect of "inhibiting religion")

("historical background" and "specific sequence of events" preceding enactment); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993)(specific intent).

All of this Court's Establishment Clause cases indicate that context is relevant. Since *Bowen v. Kendrick*, 487 U.S. 589 (1988), this Court has held that appearance or "risk" *alone* does not violate the Establishment Clause. *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 593 (2000); *Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093 (2001). It makes no difference whether the analysis proceeds under *Lemon*, explores whether the "government intends to convey a message of endorsement or disapproval of religion," scrutinizes the government's actions for evidence of coercion, or utilizes neutrality as the touchstone of the analysis, it is impossible to find the ultimate "constitutional fact" – whether the government's action is intended to serve or hamper religion – without *some* evidence of intent and application.

Whether a specific program has a "purpose or primary effect that advances or inhibits religion" is an inherently fact-sensitive inquiry. Its truth or falsity necessarily turns on a variety of factors that will differ from case-to-case, such as curriculum content, teaching perspective, classroom demographics, the denominational affiliation of the children, their teachers and the institution, the behavior and good faith of teachers and administrators, cash flow, and the state's ability to recover funds spent for illegal purposes. Neither the Sixth Circuit nor the District Court addressed the relevance of *any* of these factors, even though they were clearly presented in the record. *See* Affidavits of Delories Jones, App. AA, and Cynthia L. Felden, App. BB in J.A. 186a-189a.

Because Respondents did not undertake to demonstrate *how* the Scholarship Program funds flowing to parents who

chose religiously affiliated schools *actually* "advance religion," Petitioners were entitled to summary judgment as a matter of law.

B. The Decisions Below are "Clearly Erroneous" as a Matter of Fact, and as a Matter of Law

Relying on a narrow reading of *Nyquist*, the District Court found that the primary *effect* of the Scholarship Program was to provide substantial benefits for religiously affiliated schools, notwithstanding undisputed evidence that the scholarship does not even come close to covering the cost of educating scholarship students. *See* Affidavit of Shelia Bolek ¶9, App. Z, J.A. 184a. In the District Court's view, 72 F.Supp.2d at 849, this purported effect was so substantial that it supported a finding that the "function" of the Scholarship Program – *i.e.* its *purpose* – was "to provide assistance to private schools, the great majority of which are sectarian."

No attention whatever is given in this analysis to the *raisons d'être* for the options first made available to Cleveland parents and children in 1995: an *existing* constitutional mandate to desegregate Cleveland's schools, the need to reform them in a manner that creates a unitary school system meeting the needs of the poor and underserved, and the titanic political struggles over Ohio's school finance program. For the Court of Appeals, the existence of "other options available to Cleveland parents such as the Community Schools is "at best irrelevant." 234 F.3d at 958.[8]

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[8] Other courts have taken an equally hostile attitude toward facts that this Court has held are clearly relevant in an Establishment Clause inquiry. In *Strout v. Albanese*, 178 F.3d at 64, the First Circuit professed to be "at a loss to understand why plaintiff-appellants believe that the Establishment Clause gives them a basis for recovery" in a case where the State Legislature changed a neutral rule of general applicability into one that discriminates on the basis of religion. *Accord Bagley*, 728 A.2d at 133-35, 144-45 (finding that the statute

Amici submit that Circuit Judge Ryan was correct when he observed that both the majority and the District Court had misperceived the nature of both the factual and legal burden respondents were required to carry under the precedents of this Court. 234 F.3d at 963 (Ryan, J., dissenting) ("the majority has simply signed onto the familiar anti-voucher mantra that voucher programs are no more than a scheme to funnel public funds into religious schools."). The ruling below is tantamount to a bright line rule that a State may not provide aid to students to attend private schools, *regardless of its legislative intent*, whenever *some* significant percentage of the schools available are religiously affiliated.

The Ohio Supreme Court has held that "[w]hen a district falls short of the constitutional requirement that the system be thorough and efficient, it is the state's obligation to rectify it." *DeRolfe* I, 677 N.E.2d at 745. *See* Ohio Const. art. VI, §2. When the task is to remedy the past and present effects of *de jure* racial discrimination, the obligation is compelling under both State and federal law. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971); *Ritchey Produce Co., Inc. v. Ohio Dept. of Admin. Servs.*, 707 N.E.2d 871, 913 (Ohio 1999).

Ohio Provides Three *Funded Options Outside the Troubled Cleveland Public Schools.*

The Sixth Circuit refused to consider the legal and factual context of Ohio's school finance program because:

> [W]e would open the door to a wide-reaching analysis which would permit us to consider any and all scholarship programs available to children who qualify for the school voucher program. We would

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singled out *only* religious schools for adverse treatment without considering whether intentional discrimination on the basis of religion or religious viewpoint has "a purpose or primary effect that ... *inhibits* religion").

> be considering and comparing every available option for Cleveland children.

234 F.3d at 958. *Amici* respectfully submit that, to the extent education reforms are a "necessary and proper" means of compliance with the Equal Protection Clause, the court was required to consider the three funded options to parents and children who seek education outside the troubled Cleveland public schools:

Community Schools are publicly funded, independent schools, operated through a contract with a sponsoring agency. They are known as charter schools around the country, but community schools in Ohio are "chartered *public* schools."[9]

Statewide Open Enrollment. The second funded option for Cleveland's children is the statewide open-enrollment program created by Ohio Rev. Code Ann. §3313.98. It permits *fully funded* inter-district transfers to public school districts that permit them. *See Equal Open Enrollment Association v. Board of Educ. of the Akron City Sch. Dist.*, 937 F. Supp. 700 (N.D. Ohio, 1996) (enjoining operation of school district policy prohibiting white students from transferring to adjacent school districts under Ohio open-enrollment law). To date, the CCSD itself permits a limited number of students from outside district limits to attend, *and receives full state support for each of them.* For reasons of their own, most of Cleveland's suburban districts do not accept any inter-district transfers at this time,[10] Their schools are open only to residents.

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[9] Payments to Community Schools are detailed at https://www.edohio.org/school_options/default.asp. See also http://www.ode.state.oh.us/oso/options/commschools/generalinterest/faq.htm (basic questions and answers about the program).

[10] On October 23, 2001, staff at the Center for Education Reform called the following districts surrounding Cleveland: Brooklyn, Shaker Heights, Cleveland Heights/University Heights, Parma, Lakewood,

The State of Ohio provides $5,137.50 for each student enrolled in a public school in Cuyahoga County.[11] Were a student from Cleveland to enroll in a suburban district within the county under the open-enrollment option, state funding at the county rate would follow her.[12]

The Cleveland Scholarship and Tutoring Grant Program. Created by Ohio Rev. Code Ann. §§ 3313.974 through 3313.979, the Scholarship Program provides limited tuition at public or private schools willing to

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Euclid, Rocky River, East Cleveland, and Cuyahoga Heights. Each district was asked two questions. First, each district was asked if it allows students within its district to transfer to other schools within the district, i.e. intra-district transfers. All the above districts where there is more than one school per grade grouping permits intra-district transfers. Only the Brooklyn, Rocky River and Cuyahoga Heights districts do not permit intra-district transfers because each district only has one school per grade grouping. However, even those which allow intra-district transfers have limitations such as the Shaker Heights district which allows such transfers only "with permission." Second, each district was asked if it accepts students from outside the district, i.e. inter-district transfers. None of these districts accepts students from outside their respective district.

[11] Under Ohio law, if a student were to select an inter-district transfer, the amount of funding payable to the receiving district is the "adjusted formula amount for the district." Ohio Rev. Code Ann. § 3313.981. For the 2001-02 school year, the formula amount is $4,814 per student, which is the amount the State has determined to be the base cost of an adequate education. *See* Ohio Rev. Code Ann. § 3317.012(A)(1). The formula amount is then multiplied by a cost-of-doing-business factor (CODBF), depending upon the county where the receiving district is located. For Cuyahoga County, the CODBF is 1.0672 (also defined by statute), resulting in an adjusted formula amount for this school year of $5,137.50.

[12] For tangible examples of the program "in operation," *see* http://www.ode.state.oh.us/sf/foundation/WWW-SF3-HEADER-FY2002.HTML. To process the request, select 5-Oct-2001 in the first pull-down box, the appropriate specific school district that accepts open enrollment students (*e.g.*, Akron City School District), and check Line 22D "open enrollment." When "process" is pressed, the system will generate *current* open-enrollment financial information.

participate. A suburban school district that agrees to take out-of-district students under the Scholarship Program is compensated by the State in accordance with the formula set out in Ohio Rev. Code Ann. § 3317.03(I)(1). The receiving district thus gets the scholarship, *and* counts the scholarship student as a part of its "Average Daily Membership" (ADM) for purposes of state reimbursement.

The Sixth Circuit, by contrast, believed that the scholarship amount was the *only* payment the State would make to a suburban district. The majority opinion states: "At a *maximum* of $2,250, there is a financial disincentive for public schools outside the district to take on students via the school voucher program." 234 F.3d at 959. The facts, however, are to the contrary. The amount of the scholarship is *added* to the base payment available to the student under the State's foundation formula. Thus, the reason that "there are no spaces available for children who wish to attend a suburban public school in place of a private school under the program," *id.*, is not tied to school finance at all. *The suburban schools are open only to their residents.* The Sixth Circuit's conclusion that the financial structure "clearly has the impermissible effect of promoting sectarian schools", *id.*, is plain error.

Respondents Did Not Prove That Any Portion of the State's Payments Under the Scholarship Program Supports Religious Activities or Teaching.

The District Court held, correctly, that while the Scholarship Program serves an important secular goal, this fact alone "d[id] not obviate th[e] court's duty to further question whether the Program also has the direct and immediate effect of advancing religion." 72 F. Supp. 2d at 848. From that point forward, however, it studiously ignored the constitutional significance of undisputed facts concerning the Program's *actual* operations. It presumed – on largely doctrinal grounds that did not permit rebuttal,

that the relevant constitutional fact – that the Cleveland Scholarship Program "advanced religion" – had been proved.

The District Court did not, for example, question the fact that "educating [public school scholarship] students with such needs costs the [receiving private] schools more than the payment they receive." 72 F. Supp. 2d at 849. Assuming, as we must under Rule 56 of the Federal Rules of Civil Procedure, that the court must view the evidence in a light most favorable to the non-moving party, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Ass'n,* 909 F.2d 941, 943-44 (6th Cir. 1990), the "most favorable" conclusion that can be drawn from this undisputed fact is that when private schools accept scholarship students at rates below their normal cost of attendance, *there is no subsidy to the school.* The subsidy – in the form of a below-cost "tuition discount"– *runs in favor of the State.* The Cleveland Public Schools are subsidized as well, in that none of the costs associated with students in the Scholarship Program who choose to attend a private school are borne by the CCSD.

Rule 56(c) states plainly that summary judgment is inappropriate unless there is "*no* genuine issue as to *any* material fact" (emphasis added). But there were many such disputes in the case at bar, including one implicit in the District Court's formulation of one of the key "constitutional fact issues": whether the Scholarship Program "benefits the participating schools *in such a way as to impermissibly foster* religion." 72 F. Supp. 2d at 849 (emphasis added). Given those disputes, it should have been incumbent on the Respondents to prove, by a preponderance of the evidence, the *precise ways* in which the Scholarship Program "has the direct and immediate effect of advancing religion." 72 F. Supp. 2d at 848 (citing *Nyquist,* 413 U.S. at 783 n.39). Because they did not do so

– and did not rebut the evidence presented by the Petitioners – summary judgment for the Petitioners should have been granted.

In *Bowen v. Kendrick*, 487 U.S. 589 (1988), this Court held that an Establishment Clause challenge is no different in kind from any other claim arising under the incorporated First Amendment. The duty of the District Court is to

> consider[] ... the evidence presented by [the parties] insofar as it sheds light on the manner in which the statute is presently being administered. It is the latter inquiry to which the court must direct itself on remand.... As our previous discussion has indicated, and as *Tilton, Hunt,* and *Roemer* make clear, it is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is "religiously inspired."

487 U.S. at 621. *See, e.g., United States v. Playboy Entertainment, Inc.*, 120 S. Ct. 1878, 1891 (2000) (noting that the government had failed to make its case on the facts); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) (appellate review of facts to decide whether petitioner's activity was protected speech); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (plaintiffs in both public- and private-figure cases concerning matters of public concern bear the burden of proof on the issue of falsity); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984) (requiring "independent appellate review" of factual determinations that a libel defendant acted with actual malice). *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985).

Since *Kendrick*, this Court has consistently affirmed the importance of constitutional fact-finding in Establishment Clause litigation. *Good News Club*, 121 S.

Ct. 2093; *Mitchell v. Helms*, 530 U.S. 593; *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger*, 515 U.S. 819 (1995); *Capitol Square Review*, 515 U.S. 753; *Board of Educ. of the Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Zobrest v. Catalina Hills Sch. Dist.*, 509 U.S. 1 (1993). In the case at bar, however, the District Court and Court of Appeals treated an essentially fact-based inquiry under the Establishment Clause as one of doctrine, even though the parents and children who signed affidavits in support of the Scholarship Program view their choices as *real*, not "illusory." [App. CC and DD, J.A. at 190a-194a].

> Programs like [the Cleveland Scholarship Program] only modify or regulate the existing choice environment. And the kinds of choices exercised with a voucher have to be viewed in the context of all of the other choices provided.

Greene, *Context of Parental Choice in Cleveland*, App. II, J.A. at 217a-218a.[13]

Allowing the federal courts to strike down voucher programs in their infancy simply because a majority of students taking the cash option have chosen to attend religious schools will ensure that virtually no voucher program will survive long enough so that its *educational* effects can be measured – a result that is unsound as a matter of policy, as well as constitutionally incorrect. Interview with Caroline M. Hoxby, *Battle Over School Choice: Competition, School Choice & Charter Schools*, PBS Frontline (May 23, 2000)[hereinafter, Hoxby Interview] (arguing that voucher programs need time to

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[13] Given the range of funded options available under Ohio law, the percentage of student enrolled in religious schools drops dramatically when the number of students enrolled in each is factored into the equation.: scholarship only (96.6%); community (62.1%)); magnet (16.5%); neighborhood (3.2%). *Id.*

take hold before new secular private schools are built to meet rising demand); Policy Note, *Private School Competition Raises Salaries of Public School Teachers,* Buckeye Inst. for Public Policy Solutions (Dec. 1988, http://www.buckeyeinstitute.org/policy/1998_12.htm (discussing Richard Vedder and Joshua Hall, *Private Schools and Public School Teacher Salaries*, Ohio University (Feb. 1999).

Because the decisions below eschew fact-finding in Establishment Clause challenges to education reform initiatives, this Court should reverse.

II. THE EQUAL PROTECTION AND ESTABLISHMENT CLAUSES REQUIRE A FACTUAL INQUIRY BEFORE THIS REMEDIAL LEGISLATION IS INVALIDATED

A. The Decisions Below Inhibit Ohio's Ability to Meet Its Remedial Obligations Under Federal and State Constitutional Law.

The Scholarship Program is an important element of the Ohio's decades-long effort to rectify the past and present effects of racial segregation in Cleveland's schools. It is also an innovative attempt by the State to utilize the private education market to help satisfy its obligation under State constitutional law to provide an adequate educational program for all of Cleveland's children. *See* Ohio Const. art. VI § 2; *Simmons-Harris v. Goff*; *DeRolfe I.* As the Ohio Supreme Court observed in *Ritchey Produce Co.*, 707 N.E.2d 871 at 913 (citations omitted), these interests are "compelling," both legally *and morally*:

> There is no question that a state has a compelling interest in remedying the past and present effects of identified racial discrimination within its

> jurisdiction where the state itself was involved in the discriminatory practices. ...In addition to the foregoing legal authorities, it is also, from our perspective, the truly right thing to do.

The Ohio General Assembly "took extraordinary measures to attempt to alleviate an extraordinary situation" when it adopted the Scholarship Program, *Simmons-Harris v. Goff*, 711 N.E.2d at 214, because the CCSD had consistently failed to provide an adequate education for its minority students. Whether considered from an equal protection or an education reform perspective, the State's responsibility to ensure a quality education for all of Cleveland's children is far from being discharged. By foreclosing funded school choice as an option as long as religiously affiliated schools can participate, the courts below have made it significantly more difficult for the State to meet its legal obligations under federal and state constitutional law.

The State's need to enact reforms as a means of compliance with the Equal Protection Clause in a school desegregation context is clearly relevant to a challenge to those reforms under the Establishment Clause. There was really no dispute in the court below that the "principal purpose" of the Scholarship Program is to further the remedial goals set by the court and accepted by the State of Ohio in *Reed v. Rhodes*. Nor could there be. Respondents produced no evidence to that effect.

Statistical studies have shown that voucher programs can be an important tool for achieving racial desegregation in education. A General Accounting Office report showed that students in Cleveland public schools were more racially isolated than the students who are using the Scholarship Program to attend private schools. *See* General Accounting Office, *School Vouchers: Publicly Funded Programs in Cleveland and Milwaukee*, at 21 (Aug. 31,

2001). In a unique district like Cleveland, which has had racially segregated schools for virtually its entire existence, the Scholarship Program provides an important tool to alleviate the appalling social schism between students of different races, economic means, religions, and ethnic origin. Respondents did not adduce any evidence to *disprove* the utility of scholarships, nor did they make any attempt to prove that the Scholarship Program was really a pretext for supporting religiously affiliated schools. Nor could they: the evidence in the record is to the contrary.

Dr. Greene's study underscores the importance of funded school choice programs that include private schools. Funded school choice is a tool designed to foster the common good. It is not now, nor has it ever been, a nefarious plot either to destroy the public schools or provide money to religious causes. *Accord Goff*, 711 N.E.2d at 212. Its goal is to help children and parents choose the school that best meets their needs.

The only question before this Court is whether the "principal or primary effect" of the Scholarship Program "advances religion" because Cleveland's children and their parents have chosen to attend the only schools that are *currently* able to meet the demand for alternative nonpublic schools. The State of Ohio did not create the current private education market in Cleveland, and cannot be held responsible because the private commercial and nonprofit sectors have not, as yet, rushed in to create secular private schools. As one scholar has explained:

> It so happens that most of the existing private schools that are very inexpensive are parochial private schools in the United States.... Right now we have small, essentially experimental school choice programs.... But, if we were to have a school voucher policy that was more universal or more general, and if the size of the voucher were to be

> somewhat larger ... even if it were only 2/3 of per pupil spending in the United States, it would still be high enough so that what we would get would be private schools that were created to take students who have vouchers.

Hoxby Interview, *supra*. School choice programs need time to take hold before new secular private schools are built to meet rising demand. Once there is some degree of legal certainty that the Scholarship Program will continue to exist, the number of seats in secular schools will likely grow. "If we were to have ... universal vouchers, most of the [new] private schools that would come into existence would not be religious private schools." *Id.* Respondents did not produce any evidence to show either that the State was responsible for the choices these parents and children have made, or that it created the market in which those choices must be made. Without such evidence, it is impossible to prove that the State of Ohio *intended* to influence or limit the range of choices available.

In fact, the available evidence in the record demonstrates that the State of Ohio is attempting to *create* a diversified private-public marketplace for educational services throughout the State. It has created a framework for parental choice that includes tutoring, community (charter) schools, magnets, partial tuition scholarships, and *fully funded* inter-district open enrollment. Given time, stability, and enough demand, a diversified market will develop, and the State of Ohio will remain obligated under its own constitution to provide "a thorough and efficient system of common schools throughout the State." Ohio. Const. art. IV § 2.

Because the decisions below completely foreclose the use of school choice programs in any jurisdiction where the majority of the private schools are religious at the time the program is created, and because this result unreasonably

interferes with the State's ability to meet its remedial obligations to its students under the United States and Ohio Constitutions, the decision below should be reversed.

B. The Decisions Below are Inconsistent with the Principle of Equal Protection of the Laws Embodied in the First and Fourteenth Amendments.

The Establishment and Equal Protection Clauses are distinct affirmations of the principles of equal citizenship and equal protection.

> [T]he Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.

Kiryas Joel, 512 U.S. at 728-729 (Kennedy, J., concurring); *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting) (quoted in *Shaw v. Reno*, 509 U.S. 630, 648-49 (1993)).

The presumption that the constitutionality of a social welfare program is determined by reference to the percentage of religious groups participating, 234 F.3d at 959, is flatly contradicted by decisions of this Court. *See, e.g., Mueller v. Allen*, 463 U.S. 388, 398-99 (1983); *Mitchell v. Helms*, 530 U.S. at 842 (O'Connor, J., concurring).. Respondents must produce evidence demonstrating *how* the Scholarship Program "advances religion." *See Washington v. Davis*, 426 U.S. 229 (1976). A presumption that religiously affiliated schools cannot participate *because they are religious* is discriminatory on its face.

The courts below rested their conclusions as to the constitutional fact on the basis of inappropriate "conclusive" presumptions about the willingness or ability of religiously affiliated schools and teachers to comply with the law. This Court rejected such reasoning in *Lemon*, 403 U.S. at 606-607. Unless plaintiffs in Establishment Clause cases are compelled to adduce evidence of either misconduct or inability to comply with the rules, see *Kendrick*, *Agostini*, and *Mitchell*, the result will be judicially mandated intentional discrimination on the basis of religion *without regard to the actual intent or conduct of the State*. This is a result that violates the First and the Fourteenth Amendments. *See McDaniel v. Paty*, 435 U.S. 618 (1978). *Cf.* U.S. Const. art. VI (No Religious Test Clause, forbiding religious discrimination as a qualification for a public trust, such as the expenditure of scholarship money earmarked for secular education programs only). *See* Michael S. Ariens & Robert A. Destro, *Religious Liberty in a Pluralistic Society* (Carolina Academic Press 1996) 666-70.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the judgment of the Sixth Circuit Court of Appeals be reversed.

Respectfully submitted,

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